IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STANDING ROCK SIOUX TRIBE; YANKTON SIOUX TRIBE; ROBERT FLYING HAWK; OGLALA SIOUX TRIBE, Plaintiffs, and CHEYENNE RIVER SIOUX TRIBE, Intervenor Plaintiff, v. U.S. ARMY CORPS OF ENGINEERS, Defendant, and DAKOTA ACCESS, LLC, Intervenor Defendant.	Case No. 1:16-cv-01534-JEB (and consolidated case nos. 16-cv-1796 and 17-cv-267)

PLAINTIFF OGLALA SIOUX TRIBE'S REPLY BRIEF IN FURTHER SUPPORT OF ITS MOTION FOR LEAVE TO FILE AMENDED COMPLAINT

In their oppositions to Plaintiff Oglala Sioux Tribe's Motion for Leave to File an Amended Complaint, Defendant U.S. Army Corps of Engineers ("Corps") and Intervenor-Defendant Dakota Access, LLC ("Dakota Access") wrongly claim that the proposed amendment to the complaint filed by the Oglala Sioux Tribe ("Tribe") would be futile and that the motion is untimely. Neither is correct.

First, the proposed amendment is not futile. The Court has not addressed and ruled on the issue of whether the Corps' wholesale failure to consider comments submitted in response to the notice of intent ("NOI") to prepare an environmental impact study ("EIS") violated the National Environmental Policy Act ("NEPA"), the Administrative Procedures Act ("APA"), or regulation. The Court's previous decision on summary judgment motions addressed whether the Corps had justified its reversal of its decision to perform an EIS, and whether the Corps had adequately considered certain post-environmental assessment submissions made by plaintiff tribes, but it did not address the issue raised by the Tribe's proposed amendment, which is the Corps' wholesale failure to consider thousands of submissions to the Corps in response to the NOI before it withdrew the NOI and granted the easement. Further, the Tribe's proposed amendment is not futile under the final agency action doctrine because the issuance of the easement is clearly a reviewable decision. The Corps' decision to withdraw the NOI and issue the easement marked the culmination of the Corps' decision-making process.

Second, the motion is not made too late. Defendants have not made the showing of prejudice required to defeat a motion for leave to file an amended complaint. The proposed amendment would not delay the case, or raise novel new issues. Further, the motion to amend was filed within the time allowed by the Court for such motions, and following a period during which the case was essentially held in abeyance pending the remand, with the consent of the Corps and Dakota Access.

Because the "court should freely give leave [to allow a party to amend its pleading] when justice so requires[,]" FED. R. CIV. P. 15(a)(2), the Tribe's motion should be granted.

I. The Proposed Amended Complaint Is Not Futile

A. The Court Has Not Ruled on the Issues Raised in the Amendment

The Tribe proposes to amend Count II of its Complaint, which challenges the Corp's February 7, 2017 decision that an EIS was not required before issuing the easement for the pipeline to cross Lake Oahe, and the withdrawal of the NOI to prepare an EIS prior to issuance of the easement. *Oglala Sioux Tribe v. U.S. Army Corps of Eng'rs*, No. 17-cv-00267 (D.D.C. filed Feb. 11, 2017), Complaint ("Compl.") ¶¶ 84-89, ECF No. 1; *see also id.* ¶¶ 76-77. In its original Complaint, the Tribe alleges that the decision that an EIS was not required was in error because the pipeline will cause significant impacts to the environment and to the Tribe's statutory and treaty rights, *id.* ¶ 87, and that the decision to withdraw the NOI before the end of the scoping period and without holding a scoping session violates the NEPA, the APA, and 33 C.F.R. Part 325, Appendix B, § 8(g) (concerning the withdrawal of NOIs). Compl. ¶ 88. The Tribe now seeks to amend paragraph 88 of its Complaint to add one sentence: "Further, the Corps' decisions to withdraw the NOI and to issue the easement to Dakota Access, LLC were made without the Corps reviewing thousands of submissions in response to the NOI." [Proposed] Amended Complaint ¶ 88, ECF No. 377-1.

Defendants' arguments that the Court has already addressed this allegation and ruled on it misconstrues prior filings and rulings. Dakota Access's argument that the Court has previously "considered and granted summary judgment to the Corps and Dakota Access on Cheyenne River's indistinguishable claim[,]" Dakota Access Opp. Br. at 2, ECF No. 388, confuses the arguments raised by Cheyenne River Sioux Tribe ("CRST") in support of its motion for summary judgment, and the Court's ruling. Although CRST did state in a footnote in the fact section of its summary judgment brief, as noted by Dakota Access, that "[t]he Corps' decision[]

to rescind the EIS Notice ignored more than 200,000 comments filed in response to the EIS Notice[,]" ECF No. 131 at 5 n.3, CRST asserted no claim for summary judgment based on this fact, and the Court's decision on CRST's summary judgment motion does not mention this fact, or any argument based on it. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 255 F. Supp. 3d 101 (D.D.C. 2017), ECF No. 239. (Rather, CRST based its summary judgment motion on other claims and legal arguments, such as lack of consultation. *Id.* at 148-61, ECF No. 239 at 67-90).

Similarly, Dakota Access notes that in denying the motion for summary judgment brought by the Standing Rock Sioux Tribe ("SRST"), the Court rejected the argument that the Corps' decision to grant the easement without an EIS was an arbitrary and capricious reversal of its previous position to perform an EIS, holding that "the Corps did enough to satisfy the APA's requirements regarding policy reversals." *Id.* at 143, ECF No. 239 at 59.[1] That is so, but although SRST argued that the Corps did not meet the requirements for policy reversals, it did not assert the issue raised by the Tribe in its proposed Amended Complaint that the Corps had not considered all of the comments submitted in response to the NOI.

Dakota Access and the Corps rely on the Tribe's amicus brief filed in support of SRST's motion for summary judgment, in which the Tribe argued that "[t]he withdrawal of the NOI is arbitrary and capricious because it does not take into account the comments of the Tribe and its expert (which was resubmitted to the Corps in response to the NOI, Ex. 3), or other comments received by the Corps subsequent to the EA." ECF No. 138 at 20, quoted in Dakota Access Opp. Br. at 5, ECF No. 388, Corps' Opp. Br. at 3, ECF No. 387. In its decision, the Court did address

[1] While Dakota Access discusses this decision as "upholding the Corps' decisions to withdraw its NOI and issue the easement without an EIS[,]" Dakota Access Opp. Br. at 6, ECF No. 388, SRST did not challenge the withdrawal of the NOI as such. *Standing Rock Sioux Tribe*, 255 F. Supp. 3d at 142, ECF No. 239 at 56 ("Standing Rock does not, it clarifies in its Reply, assail the withdrawal of the [NOI].").

certain submissions received by the Corps after the environmental assessment and prior to the issuance of the easement which the Corps had received by channels other than the NOI comment process and which the Corps had included as part of the administrative record, including specifically plaintiffs' expert reports submitted prior to the NOI. *Standing Rock Sioux Tribe*, 255 F. Supp. 3d at 124, ECF No. 239 at 24 (holding that "the Court can review the materials before the Corps as of February 8, 2017, for purposes of evaluating the decision to grant the easement absent an EIS"), *see also id*. at 129, ECF No. 239 at 34 (holding that the Corps violated NEPA by failing to address plaintiffs' expert reports, some of which were "wholly ignore[d]," and by failing to consider the degree to which the pipeline's effects are likely to be highly controversial). The Court did not, however, address the Corps' wholesale failure to consider documents received by the Corps in response to the NOI—which documents were not, by the Corps' admission, included in the administrative record. *See* U.S. Army Corps of Eng'rs Opp. to CRST's Mot. to Suppl. the Admin. R. and Alternative Mot. to Consider Docs. Outside the Admin. R. at 11, ECF No. 232.

In short, the Court's summary judgment decision did not address whether the Corps' failure to consider comments filed in response to the NOI violated NEPA, the APA, or regulation, nor did it even address the fact that the Corps had not considered those comments.

B. The Corps' Decision to Withdraw the NOI and to Issue the Easement Without Preparing an EIS and Without Considering Comments is Reviewable under the APA

The Corps' argument that the proposed amendment is futile because the withdrawal of the NOI does not constitute final agency action reviewable under the APA is a red herring. There is no doubt that the issuance of the easement is a reviewable decision. *See Standing Rock Sioux Tribe*, 255 F. Supp. 3d 101, ECF No. 239. Although as a general rule an NOI "and

ongoing scoping activities" are not the agency's "last word," *Cent. Delta Water Agency v. U.S. Fish & Wildlife Serv.*, 653 F. Supp. 2d 1066, 1092 (E.D. Cal. 2009) (emphasis added), cited in Corps' Opp. Br. at 4, ECF No. 387, here there were no ongoing scoping activities, and the Tribe challenges not only the withdrawal of the NOI and the decision that no EIS was required (itself a reviewable decision), but also the issuance of the easement. [Proposed] Amended Complaint ¶ 88, ECF No. 377-1 ("Further, the Corps' decisions to withdraw the NOI and to issue the easement to Dakota Access, LLC were made without the Corps reviewing thousands of submissions in response to the NOI."); *see Citizens Ass'n of Georgetown v. Fed. Aviation Admin.*, 896 F.3d 425, 434 (D.C. Cir. 2018) ("The December 2013 publication of the FONSI/ROD satisfied both elements of this court's finality test: it 'mark[ed] the consummation of the agency's decisionmaking process and ... [was] a source of legal consequences.'") (quoting *City of Phoenix, Ariz. v. Huerta*, 869 F.3d 963, 968 (D.C. Cir. 2017), *opinion amended on reh'g*, 881 F.3d 932 (D.C. Cir. 2018)).

II. The Proposed Amendment Does Not Unfairly Prejudice Defendants and is Not Too Late

A. Defendants Have Not Met Their Burden of Showing That They Will Be Prejudiced by the Proposed Amendment

"[D]elay alone is not a sufficient reason for denying leave . . . . If no prejudice [to the non-moving party] is found, the amendment will be allowed." *Caribbean Broad. Sys., Ltd. v. Cable & Wireless P.L.C.*, 148 F.3d 1080, 1084 (D.C.Cir.1998) (quoting 6 Charles Alan Wright, Arthur R. Miller & Mary Kane, Federal Practice & Procedure § 1488 (2d ed. 1990 & Supp. 1997)); *see also 2910 Georgia Ave. LLC v. District of Columbia*, 312 F.R.D. 205, 213 (D.D.C. 2015) (quoting *id.*).

Defendants have not shown and cannot show that they would be burdened by the proposed amendment. It does not "substantially change[] the theory on which the case has been

proceeding[,]" it would not "require[] [Defendants] to engage in significant new preparation," nor would it would require "added expense and the burden of a more complicated and lengthy trial[,]" or raises "issues . . . remote from the other issues in the case." *Djourabchi v. Self*, 240 F.R.D. 5, 13 (D.D.C. 2006) (internal quotations omitted).

Dakota Access's arguments to the contrary are vague and unsupported. It asserts that we are at a critical juncture in this case, Dakota Access Opp. Br. at 8, ECF No. 388, but in fact we are awaiting the production of the administrative record on the remand decision, and summary judgment briefing has not yet been scheduled. If the proposed amendment is permitted, it will not cause delay in this case. The Tribe will litigate this claim at the summary judgment stage along with its other claims. Cases relied upon by Dakota Access do not support the argument that it will suffer prejudice. The cases are fact-specific, and require that the defendants show actual prejudice, and not just delay. *E.g.*, *Atchison v. District of Columbia*, 73 F.3d 418, 425-27 (D.C. Cir. 1996) (finding prejudice—based on three factual reasons specific to the case—where plaintiff sought to amend complaint to sue defendant police officer in his personal capacity on eve of trial); *Bell v. Dep't. of Def.*, No. 16-0959, 2018 WL 4637005, at *17 (D.D.C. Sept. 27, 2018) ("Plaintiff's proposed amendment would significantly delay the resolution of this matter by necessitating a renewed round of briefing by all parties."); *Thorp v. District of Columbia*, 325 F.R.D. 510, 514 (D.D.C. 2018) ("[G]ranting Plaintiff's request would only unduly increase discovery—a process that has already lasted more than 19 months—and delay a resolution on the merits.") (internal quotation and citation omitted).

The Corps' argument that it would be prejudiced because the proposed amendment would "revive and reframe" arguments already considered by the Court, Corps Opp. Br. at 5, ECF No. 387, should be rejected for the reasons stated previously concerning what the Court has decided.

B. The Tribe Did Not Delay Unreasonably

Although the lack of prejudice to Defendants is dispositive, it bears noting that the Tribe did not unreasonably delay filing its motion to amend. First, the motion was filed within the time set for the Court to file motions to amend complaints. *Council on Am.-Islamic Relations Action Network, Inc. v. Gaubatz*, 891 F. Supp. 2d 13, 32 (D.D.C. 2012) ("[I]t is worth noting that Plaintiffs first filed their Motion to Amend within the deadline expressly contemplated by the Court's scheduling order . . . . The fact that Plaintiffs acted within the specific time constraints contemplated by the Court is an important consideration counseling against a finding that Plaintiffs acted with undue delay in filing the pending motion.").

Second, it bears noting that the case was largely held in abeyance during the remand, with the consent of the Corps and Dakota Access, and further, that the Corps consented to the case being held in abeyance with the express understanding that plaintiffs would amend their complaints following the remand. On October 18, 2017, after ruling on the cross-motions for summary judgment and ordering a partial remand, the Court held a status conference. At that conference, the Corps' attorney stated as follows:

> So in that case, I would like to state our general agreement with what Standing Rock and Cheyenne River stated, that the case should largely be held in abeyance until after remand.
>
> I would like to flag a few additional issues. One, the United States has four outstanding answers that are due: Our answers to Standing Rock's amended complaint, Cheyenne River's amended complaint, Mr. Vance's complaint and the individual plaintiffs['] complaint. So I would ask that those be included in the matters that are held in abeyance until after remand.
>
> Related to that, we believe as the first principle that all parties should have the opportunity to amend their complaints after remand. So we would rather not answer the current complaints, we are expecting there is a good chance that many parties will amend their complaints. Okay.

Transcript of Status Conference, attached as Exhibit A, at 17 ll. 5-21. Dakota Access tacitly consented to the case being held in abeyance as well. At the end of the status conference, the Court inquired of Dakota Access's lawyer whether he had anything to raise, to which he replied simply "No, nothing further, Your Honor." Ex. A at 20 ll. 16-18. Following the status conference, the Court entered a minute order that, *inter alia*, held in abeyance Defendants' obligation to file answers until further order, and required any plaintiff wishing to file a motion for summary judgment before the conclusion of the remand to first seek leave of Court to do so. Minute Order entered Oct. 18, 2017.

On these facts, the Tribe did not unreasonably delay in filing its motion to amend the complaint.

CONCLUSION

For the foregoing reasons, as well as those stated in the Tribe's opening memorandum in support of the motion, we ask that this Court grant the Tribe's Motion for Leave to File an Amended Complaint.

Respectfully submitted,

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January 2, 2019

EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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STANDING ROCK SIOUX TRIBE, et al

Plaintiffs

v. Civil Action 16-1534.

U.S. ARMY CORPS OF ENGINEERS, et al

Defendant

----------X

Washington, D.C
Wednesday, October 18, 2017
10:00 a.m.

TRANSCRIPT OF STATUS CONFERENCE
BEFORE THE HONORABLE JAMES E. BOASBERG
UNITED STATES DISTRICT JUDGE

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P R O C E E D I N G S

THE DEPUTY CLERK: This is Civil Action 16-1534. Standing Rock Sioux Tribe versus United States Army Corps of Engineers, et al.

Counsel, please approach the lectern and identify yourselves for the record.

We also have via telephone conference Bob Comer, Jennifer Baker, Jeffrey Rasmussen and Bruce Afran.

MR. HASSELMAN: Jan Hasselman for Standing Rock Sioux Tribe.

THE COURT: Good morning.

MR. MESSINEO: Good morning, Your Honor. Joseph Messineo for Cheyenne River Sioux Tribe and for Steve Vance.

THE COURT: Good morning.

MR. ROY: Michael Roy for the Oglala Sioux Tribe.

THE COURT: Good morning.

To other plaintiffs or intervenors, other plaintiffs on the phone, I heard some names but if you can tell me who you are representing, that would be helpful.

MR. AFRAN: Your Honor, Bruce Afran. I'm representing what will be called the Jumping Eagle Intervenors, the individual plaintiff.

THE COURT: Okay. Good morning.

MR. AFRAN: Good morning.

MS. NAGLE: Good morning, Your Honor. Mary Kathryn Nagle from Pipestem law. I represent the amicus party, National Indigenous Resource Center, among others.

THE COURT: Good morning.

MS. BAKER: This is Jennifer Baker and Jeffrey Rasmussen, representing the Yankton Sioux Tribe.

THE COURT: Good morning to you.

MS. BAKER: Good morning.

THE COURT: Okay. Defense?

MR. MARINELLI: Good morning, Your Honor. Matt Marinelli for the federal defendants. With me at counsel table is Ben Schifman, Erica Zilioli also from Department of Justice and Milton Boyd from the Army Corps of Engineers.

THE COURT: Good morning to you folks.

MR. DEBOLD: Good morning, Your Honor. On behalf of Dakota Access, David Debold. Also with me at counsel table are Bill Scherman, Rajiv Mohan, and on the phone is Bill Comer.

THE COURT: Good morning to you.

There are a few issues I want to talk about this morning which mainly relate to how we're going to proceed from here. The first issue that I did raise in the opinion relates to measures that plaintiffs have raised that should occur during remand. And as my opinion noted, defense

didn't discuss those as specifically as I would have liked in the briefing. So I would like to have them have an opportunity to brief that. But I would like to move forward on that fairly quickly. And I don't expect lengthy briefing at all on this.

So Mr. Marinelli, how quickly can you respond to plaintiffs' demands?

MR. MARINELLI: Your Honor, our proposal is that the United States and Dakota Access each get a chance to file briefs by November 29. I say -- I'm sorry, November 8th. Sorry. I was reading my date for the plaintiffs. I apologize. So, by November 8th for the defendants. I see he say that date because we want to have an opportunities to coordinate fully with both PHMSA and the Court.

THE COURT: And the plaintiffs respond--

MR. MARINELLI: By November 29th or earlier if they choose. Our proposal there would be that Standing Rock and Cheyenne River, again, make the effort to file a combined brief of no more than 15 pages. And the other plaintiffs attempt to coordinate with Cheyenne River and Standing Rock. If that fails, have the ability -- or if they feel a need to say something else, have the ability to file an additional five page brief.

THE COURT: Okay.

Mr. Hasselman, your response to that proposal?

MR. HASSELMAN: Thank you, Your Honor.

As we always try to do, we endeavor to reach an agreement on a schedule so we wouldn't drag you into it. We were not able to do that here. Our position is that, since the oil is flowing, since there is a risk, we would like to get this moving more quickly than that. We put our proposal in our August brief. Our proposal was to the government was they get a week to -- after this hearing, to respond. Then we take a week after that. So, we weren't able to reach an agreement on the dates.

As to the pages, we will always endeavor to file a joint brief with Cheyenne River Tribe but we can't make that firm commitment up front. Both parties are sovereign governments. So what I would propose in the alternative is Standing Rock and Cheyenne River would use as many pages as were used by the government and Dakota Access in our response brief. So we're proposing one week to file a brief and one week to reply.

THE COURT: Thank you.

Mr. Debold, do you want to be heard?

MR. DEBOLD: Yes, Your Honor. We join in the Corps' request to have until November 8th for some of the same reasons. We would like to make sure that any conditions that we brief are not going to be in some way duplicative of what PHMSA may already be planning to do.

I would also note that in their briefs the plaintiffs had asked for three things, actually two things. The second one has two parts. The first was to have the tribes involved in the emergency planning. Frankly, that's the most urgent of the things that they have asked for. And as we've said in our brief, the company has no objection to being involved, have the tribes involved in that process.

And in fact, we'll lay this out in our brief, we've already had communication between the company and Elliott Ward who was the representative from Standing Rock who was designated by the tribe as the right person to contact. And they're planning to have a meeting. Mr. Ward asked for us to wait until after October 31st to have that meeting because needs to coordinate with the new leadership of the tribe. So the short point there is we're already in the process of getting the tribe involved in the emergency planning and developing a new--

THE COURT: But that meeting wouldn't delay the briefing, though.

MR. DEBOLD: No. I'm saying that issue, we think it is off the table already because we've already basically acquiesced to the request informally.

The other things that the tribes are asking for are an audit process. According to the condition that

PHMSA proposed that they think the Court should propose, that audit would take place and be required by April 1. The reporting requirements that they're asking for, again recommended by PHMSA, PHMSA recommended that the reporting take place by February 1st, I believe. So, having us brief this in November gives the Court plenty of time to decide whether or not to impose the conditions, at least as they were proposed by PHMSA because of the timing that goes with those proposed conditions. So that's part of reason why we suggest that we stick with the schedule that the Corps proposed.

THE COURT: Okay.

Mr. Hasselman, do you want to respond to that?

MR. HASSELMAN: Sure, briefly.

On the audit, what we asked for was to have the audit completed by the end of the year, not as the original condition had imagined. So we do think there is some urgency getting that done.

As to the first issue, yes, folks at Dakota Access sent an e-mail on Monday of this week after your ruling, initiating a conversation that we had asked to begin back in May. I don't think that takes it off the table for purposes of this Court's briefing. We'll see if things can be worked out. But we're still going to be asking you to impose some conditions around that.

THE COURT: Okay.

Mr. Marinelli, do we really need three -- tell me why you need three full weeks for this? I think, as Mr. Hasselman points out, this was in their brief which was filed a few months ago.

MR. MARINELLI: Your Honor, I spoke with PHMSA yesterday, I will speak to them today. I've spoken with the Corps about this Court's order on the subject. My understanding is that the availability of PHMSA program people is going to push, is going to make it very hard for me to coordinate with PHMSA by next week completely. But I see three weeks because, in my initial discussions with both the Corps and PHMSA, that appeared to be the most reasonable date to be able to effectively--

THE COURT: It is not an unreasonable date. But I think given the fact that the issues were teed up early enough, I'll give you two weeks. I'll say November 1. Again, write 10 pages, up to 10 pages for each, the government and Dakota Access.

Mr. Hasselman, what do you want for, I'll give you as much time as you want since you are the one pressing the urgency. Do you want two weeks from the first? Do you--

MR. HASSELMAN: I think for docketing purpose, if you put in a deadline of two weeks after the first and

we'll try to get it in sooner.

THE COURT: Okay. That sounds fine.

Does anyone else on the phone object to --

And what I will say is, again, I would prefer combined briefs. I understand Mr. Hasselman's point. I think that Standing Rock and Cheyenne River have certainly collaborated throughout cooperatively. But I'm not going to require them to do so. But I'll give, that your briefs can be up to 15 pages each. Any other brief by any other party can be up to five pages.

So, Mr. Messineo, anything you want to add to that?

MR. MESSINEO: No, Your Honor. Cheyenne River is in agreement with Standing Rock on these issues.

THE COURT: Thank you.

Anyone else on the phone that wants to be heard, objecting to what I just proposed?

(No verbal response).

THE COURT: All right. Thank you.

So the next issue, and I know that the tribes have to make tactical decisions about how to proceed in the litigation. But we have other counts that still exist, namely the RFRA claim and the National Historic Preservation Act claim.

In my preliminary injunction rulings, I have

ruled in part on a lack of likelihood of success on the merits. Now, I don't know whether, from a tactical or appellate position, you are willing to simply -- we could have cross summary judgment briefs that simply rely on the papers that were already filed. Obviously, I welcome for you to produce new evidence and arguments that are going to change my mind. I thought the issues were well briefed. And I certainly gave it plenty of thought the first time around. I don't know if you are going to succeed or not on the merits of those.

But we have a few options. One is we can wait until the remand is complete and then you can brief, if there is another EA after the remand or if they don't change their mind on the remand, then you can brief that. I'll address that. And then we can hold the issues in abeyance until then.

Second, we can go further with the other issues either by full briefings or you can rely on what you all have already briefed. I would then just issue an opinion, saying I adopt the reasoning that I had earlier. Again, that cleans it up for appellate purposes if that is what you want. Again, you have a lot of ways you can go with this. I want to accommodate everybody and be as efficient as possible.

But why don't you give me your position, Mr.

Hasselman.

MR. HASSELMAN: We appreciate the opportunity to talk about that. I think from my client's perspective, we would want to focus on the remand. So the option that you first articulated is let's hold off until that process is complete, there may be another round of amended complaints and briefing, and we'll wrap it all up at that time.

THE COURT: So in other words, aside from the remedial steps during remand that you are briefing now, the remainder of the case will be held in abeyance until after the April decision on the remand.

MR. HASSELMAN: I think that's right, with some exceptions that might be characterized as cleaning up the docket. One thing that we are considering is taking the Court of Appeals' invitation to return to you with a request to vacate the preliminary injunction order as moot. So, you might see that while the remand is underway and some other things with respect to the protected materials. But substantively I think we're talking about post remand.

THE COURT: Okay. Thank you.

Mr. Messineo, do you want anything different from your perspective?

MR. MESSINEO: No, Your Honor. Cheyenne River Sioux and Mr. Vance are perfectly satisfied with holding off on briefing until the remand is finished.

THE COURT: All right.

Any other plaintiffs on the phone who disagree?

MS. BAKER: Your Honor, this is Jennifer Baker for the Yankton Sioux Tribe.

The Yankton Sioux Tribe is looking at filing a motion for partial summary judgment on issues that are separate from what has already been briefed to this Court and what the remand is focusing on. The tribe takes the position that the oil is still flowing, so the potential for harm is still very much there. And the tribe is entitled to basically protect its interest through a motion for partial summary judgment without needing to wait or delay.

There is no rule or requirement that the tribe should need to wait until after the remand is processed and as a matter of due process should be able to move forward with its motion.

THE COURT: On which claim?

MS. BAKER: One is a treaty-related claim. But it is different from the claim made by Standing Rock. The other claim is on segmentation under NEPA.

THE COURT: All right. I can't prohibit you, I suppose I could, but I won't prohibit you from filing a separate summary judgment if there is claim that is different from what has been raised by the other

complaints.

So I won't give you a deadline for that because the case will otherwise be held in abeyance until we come back after remand. But if you want to file something, you may I do so.

Mr. Roy, I'm sorry, I didn't mean to ignore you. I'm trying to keep all the players straight.

MR. ROY: Very well, Your Honor. The Oglala Sioux Tribe has raised some claims that are different from the NEPA claim. For example, there is a statute, the Mni Wiconi Act, that creates a federal water project for the tribe, that is in trust for the tribe. It draws water from the Missouri River, would be impacted if there was spill. And we've certainly informed our client of which claims we feel are different than the NEPA claim that has been adjudicated. And that could go forward if the client wanted us to. Or we've identified the other option that we wait until the remand. We don't have any client instruction yet. So we've endeavored in the past week to get that. But that's where we stand right now.

THE COURT: So you are sort of in the same boat as Ms. Baker.

MR. ROY: They sound like they're in the planning process and they're going to do it. I'm not saying that we're going to do it. I'm saying that we're still

identifying.

THE COURT: I'm happy to give you the same response that I gave her.

MR. ROY: Thank you.

THE COURT: Thank you.

All right. Mr. Marinelli --

MR. AFRAN: Your Honor, Bruce Afran for the individual intervenor plaintiff.

I was instructed to review the issue of whether there is a scientific or engineering basis for injunctive relief on the flow of oil beyond what has been raised thus far.

I frankly don't know if my client will produce a report along those lines. They've had some preliminary work on it. I can't say they're going to do it. But I wanted to give notice that that is something they're considering at some point.

THE COURT: Okay. Thank you very much.

Anybody else on the phone?

Mr. Marinelli?

MR. MARINELLI: Thank you, Your Honor. First, I would respectfully return to the page limits on the--

THE COURT: Yes.

MR. MARINELLI: I think you gave the defense side 10 pages and the plaintiffs side 15 pages in reply.

THE COURT: Yes, because the point is that they are responding to two times 10. In other words, yours plus Dakota Access'.

MR. MARINELLI: Okay.

So in that case, I would like to state our general agreement with what Standing Rock and Cheyenne River stated, that the case should largely be held in abeyance until after remand.

I would like to flag a few additional issues. One, the United States has four outstanding answers that are due: Our answers to Standing Rock's amended complaint, Cheyenne River's amended complaint, Mr. Vance's complaint and the individual plaintiffs complaint. So I would ask that those be included in the matters that are held in abeyance until after remand.

Related to that, we believe as the first principle that all parties should have the opportunity to amend their complaints after remand. So we would rather not answer the current complaints, we are expecting there is a good chance that many parties will amend their complaints. Okay.

Let me ask Mr. Hasselman, any objection to holding that in abeyance as well?

MR. HASSELMAN: No.

THE COURT: Okay. Thank you.

MR. MARINELLI: If I could also address the issue of summary judgment briefing.

THE COURT: You mean by the other parties who mentioned it, other plaintiffs?

MR. MARINELLI: Yes. We do not object to Yankton being able to file a Motion for Summary Judgment. But we believe that all parties should essentially just get one more bite at the apple and that they should bring all their claims going forward in a single summary judgment motion.

THE COURT: But the parties are disparate. You mean they're disparate parties, so do you mean while -- in the same timeframe?

MR. MARINELLI: Not necessarily but that each party get one more bite at the apple, not that Yankton would have one summary judgment motion now and get to bring a summary judgment motion on a different set of claims later. We would apply that to the Oglala Sioux Tribe as well.

THE COURT: Let me hear, Ms. Baker, your position on that.

MS. BAKER: Your Honor, there is no requirement or no limitation by law on the number of summary judgment motions. If we're going to have an opportunity for amending our complaint after remand, it may be that a

summary judgment motion would then become appropriate based on those claims, separate from what we're looking at bringing right now. So we would ask that that restriction not be placed on the tribe, again, as a matter of due process.

THE COURT: It is really a judicial efficiency question. I agree that there is no requirement that only one summary judgment motion be brought. But it is difficult for the defense and for me if these are brought in piecemeal and then rebrought after amendment.

What I'll say is this, because this all remains speculative, that if any party wishes to file a summary judgment motion before the remand is complete, that party will first file a notice with the Court. This would just be, I'll just say a very short notice explaining the basis and proposed timing because that way I can decide how I want to proceed with it. So in other words, you can't file a Motion for Summary Judgment without my leave. And after you provide notice, if, in the event -- and this relates to all parties, Mr. Roy and Mr. Afran, too. That you will file a notice with me and I'll permit whether I will permit the filing and timing. That's the easiest way to proceed.

MR. MARINELLI: One final issue, Your Honor. We think it advisable to set a status conference after remand.

THE COURT: I'm going to have periodic status

reports, status reports every 60 days about how things are proceeding. So we'll start, I think what I'll start is December 1. And then February 1, April 1. Then I'm happy to set, I agree we'll have a status after remand. But we don't have a date when that is. So I would hope that the April 1st status report will let me know more likely timetable. Then we can set a status conference thereafter. Does that make sense?

MR. MARINELLI: Yes.

THE COURT: So I guess, I'm open to -- this will be a status report by the defense -- by the government. And if any other side wants to file its own status, that's fine. But I'm mainly interested in hearing how the remand is proceeding. Okay?

MR. MARINELLI: Thank you, Your Honor.

THE COURT: Mr. Debold, anything you want to raise?

MR. DEBOLD: No, nothing further, Your Honor.

THE COURT: Okay.

Mr. Hasselman, anything else that we have not covered today?

MR. HASSELMAN: No, thank you.

THE COURT: Mr. Messineo?

MR. MESSINEO: No, Your Honor, thank you.

THE COURT: Mr. Roy?

MR. ROY: No, Your Honor, thank you.

THE COURT: Anybody else on the phone want to be heard?

(No verbal response)

THE COURT: Thank you all very much. I'll issue a minute order that reflects this proposed schedule. And we'll be in touch. Thank you.

(Whereupon, at 12:02 p.m., the hearing concluded.)

CERTIFICATE OF REPORTER

I, Lisa Walker Griffith, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Lisa Walker Griffith, RPR _____ Date